

**CONTRACT FOR CONSTRUCTION OF UTILITY IMPROVEMENTS AND FOR  
REIMBURSEMENT OF CERTAIN COSTS OVER A PERIOD OF YEARS**

**PW Utility Reimbursement Contract # \_\_\_\_\_**

**THIS CONTRACT** ("Contract"), is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between **PULTE HOME CORPORATION**, a Michigan Corporation, (hereinafter the "Utility Developer") and the **CITY OF DURHAM**, a North Carolina municipal corporation (hereinafter the "City")(collectively referred to hereafter as "the Parties");

**BACKGROUND.** The Utility Developer wishes to construct water and/or sewer infrastructure ("Utility Improvements" or "Improvements") in the Service Area described below to connect to the City's utility system. The Improvements are sized to be larger than Utility Developer might size them if it were solely serving its own needs and are being oversized in order to allow the City's utility system to function in a practical, efficient, and economical manner. Construction of the Improvements benefits Utility Developer by allowing it to build its development in its own timeframe in the near future, rather than waiting for many years until the City itself chooses to finance utility expansion or until other developers in the area choose to build portions of the Utility Improvements. Construction benefits the City by allowing it to expand the utility system without cost to itself, and add future customers. Construction benefits future developments in the Service Area by providing infrastructure to serve those developments that they might otherwise have to build themselves if it were not already available.

**OBJECTIVES.** This Contract sets forth the terms and conditions under which certain costs sustained by Utility Developer and considered as reimbursable under this Contract will be either reimbursed by the City or shared by future developers in the area benefited by the Utility Improvements. To that end, the general objectives of this Contract are that (1) Utility Developer will construct the Utility Improvements to City standards; will pay all costs of property acquisition for, and design, permitting, contracting, construction, and testing of the Utility Improvements; and will offer the Improvements and associated property or easements containing the Improvements to the City upon completion; (2) the City will accept the completed Utility Improvements that are constructed to City standards for ownership and maintenance upon completion and submission of necessary documentation, and will offer utility service through use of those Improvements; 3) upon acceptance of certain Improvements, the Utility Developer will be reimbursed by the City for the difference in cost between the necessary improvement and the over-sized improvement that provides added capacity as detailed by this contract; 4) after completion of certain other Improvements, new developments that benefit from these Improvements will make payments to the City in an amount which is, at a minimum, the amount set forth in this Contract upon the permitting of their individual utility lines, pursuant to Utility Extension Agreements between the City and those developments; and these payments will be considered by the City to be for the benefit of the Utility Developer, and for a defined period of years, the City will transmit the payments, less a retainage for administrative costs, and less costs of repairs and other identified expenses, to reimburse Utility Developer for its reimbursable costs as defined in this Contract.

This Contract sets forth the terms and conditions that effectuate these objectives.

**NOW, THEREFORE**, in consideration of ten dollars and other valuable consideration, the receipt of which is hereby acknowledged, and the mutual benefits to be received by both parties from the construction of the Utility Improvements, including but not limited to those benefits described above, the Utility Developer and the City, and their heirs, successors, and assigns agree as follows:

## **1. TERMS AND DEFINITIONS.**

**“Approved Engineer”** means one or more professional consulting civil engineering companies approved by the City that is/are responsible for preparing plans and specifications for the construction of the Utility Improvements. For purposes of this Contract, the Approved Engineers are Hazen and Sawyer, P.C. and Horvath Associates, unless such Approved Engineers are changed as provided hereafter.

**“Certified Construction Costs”** means the costs for labor and material for constructing the Utility Improvements, as certified by a professional engineer licensed in the State of North Carolina, rendered pursuant to one or more contracts with contractor(s) licensed in the State of North Carolina.

**“City Authorized Designee”** means the Director of Public Works or designee within the Department of Public Works, or any successor position to those positions, or other person designated in writing by the City Manager.

**“City Contact”** means one or more employees of the City identified by the City Authorized Designee for the purpose of receiving information from Utility Developer, relaying required approvals from the City Authorized Designee, and, where allowed in this Contract, giving approvals.

**“Eligible Costs”** means the Utility Developer’s costs for the Project that this Contract defines as potentially reimbursable. Eligible costs shall be documented as required herein and are limited to those costs described in Paragraph 10.

**“Future Benefited Developments”** means developments located within or near the Service Area which will make use of some or all of the Improvements constructed by the Utility Developer.

**“Project”** means the construction of the Utility Improvements as described in this Contract.

**“Project Map”** is that map titled “Lick Creek Sewer Basin 25, NTS—October 2012”, prepared by Horvath Associates, and dated October, 2012, labeled as Exhibit A and incorporated into this Contract by reference.

**“Reasonable Infrastructure Payment”** means the amount the City will require Future Benefited Developments to pay for the use of the Utility Improvements, pursuant to Utility Extension Agreements between the developers of such Future Benefited Developments and the City.

**“Reasonable Time Period for Completion” or “Reasonable Time Period”** in this Contract is defined as execution of the contract(s) for construction of the Project within eighteen months of execution of this Contract, and completion of construction within four years of execution of this Contract. The Reasonable Time Periods shall be extended by any events that constitute a Force Majeure and by any delay necessitated by permitting delays or any land contract or condemnation that may be required to acquire property necessary for the Project, and the extension shall equal the time period caused by the event resulting in the delay.

**“Reimbursable Costs”** means the portion of the Eligible Costs that the City, in its reasonable discretion, determines at the inception of the Reimbursement Period to be the amount that may be reimbursed to Utility Developer either through direct reimbursement at the time of acceptance of the improvement or through the City’s receipts from Reasonable Infrastructure Payments. The amount reimbursed through the Reasonable Infrastructure Payments shall be adjusted, through addition of yearly interest, and through deductions that may be made if the City incurs expenses for certain repairs or other identified expenses, as provided hereafter in this Contract. The reimbursable costs, with interest and less allowed deductions, is the **“Adjusted Reimbursable Costs.”**

**“Reimbursement Period”** is the time period during which the City shall remit to Utility Developer any Reasonable Infrastructure Payments, less administrative retainages, it may receive from Future Benefited Developments. The Reimbursement Period in this Contract shall be 15 years, unless the amounts to be paid to Utility Developer under this Contract are paid earlier. The Reimbursement Period may also be extended if unforeseen events described hereafter occur.

**“Service Area”** means that area that will be served by the Utility Improvements. The Service Area is generally bounded by US 70 to the south, Leesville Road to the west and north and the Raleigh-Durham Service Boundary to the east. The area is primarily in Durham County, but also includes a portion of Wake County north of HWY 70.

**“Utility Extension Agreement” or “Extension Agreement”** means the contracts routinely and regularly entered into between the City and developers of residential and nonresidential properties who construct water and/or sewer improvements in order to receive utility service from the City for their development(s).

**“Utility Improvements” or “Improvements”** mean the facilities to be constructed by Utility Developer pursuant to this Contract. These are, generally, the Basin 25 Regional Pump Station, a force main, various gravity sewer outfalls and water mains. More specifically, the Improvements consist of:

- A Pump Station with a capacity of up to 2,200 GPM (“PS”) serving Drainage Basin 25 and associated equipment to be located in the vicinity of US 70 and , the exact location to be agreed to by the parties;
- Approximately 21,000 LF of 16” diameter force main and/or gravity main from the PS to the existing Brightleaf Pump Station, within the Brightleaf subdivision;
- Approximately 7,400 LF of 10”-18” gravity outfalls in DA-25 connecting to;
- Approximately 13,000 LF of 12” water main connecting the TW Alexander/Hwy 70 intersection with the Leesville Road/Doc Nichols Road Intersection.

Minor modifications, and additions, such as minor outfalls, may be added to the Utility Improvements through written agreement of Utility Developer and the City Authorized Designee as further described hereafter.

**“Warranty Period”** means the time period starting with City acceptance of the Improvements during which Utility Developer warrants their fitness and performance. Such period shall be 2 year from acceptance for pump stations, booster stations, water storage facilities, force mains, and 1 year for gravity flow lines.

**2. NO OBLIGATION TO CONSTRUCT.** This Contract sets forth the terms and conditions for construction of the Utility Improvements, and pass-through from the City to Utility Developer of payments made by other developers to the City for Adjusted Reimbursable Costs of the Utility Improvements. This Contract does not obligate Utility Developer to undertake the Project, and it does not obligate the City to remit Reasonable Infrastructure Payments in the event the Project is not undertaken, or if the Project is not completed within a Reasonable Time Period for Completion.

**3. DESIGN/ENGINEERING.** Utility Developer shall engage an Approved Engineer to design the Utility Improvements to meet all City requirements and specifications, including but not limited to the size and type of material used. Utility Developer shall furnish all engineering and/or design plans and specifications to the City Contact prior to contracting for construction of the Project. The City Contact may disapprove, in writing, such plans or specifications in the his/her reasonable discretion. If the plans are disapproved, upon request of the Utility Developer, the City Authorized Designee shall review the determination, and provide written explanation of the reasons for disapproval. If Utility Developer wishes to make a change in the Approved Engineer, Utility Developer shall submit a request to make such change, and the reasons for such a change, to the City Contact for approval/disapproval in his/her reasonable discretion, which shall be given in a timely manner.

**4. CONTRACTING; CONSTRUCTION; ADMINISTRATION; PERMITS.** Utility Developer shall be responsible for the contracting, administration, construction, and permitting of the Utility Improvements. The Project shall be constructed by one or more contractors chosen by Utility Developer who are licensed in North Carolina to perform the work they are contracted to do. Names of proposed contractors shall be submitted to the City Contact. The

City Contact may disapprove such contractors in his/her reasonable discretion, which shall be given in a timely manner. Utility Developer shall provide any contracts, including subcontracts, for work on the Project to the City upon request by the City Contact. The Project shall be completed in accordance with City standards and specifications, as they may exist now or in the future. Utility Developer agrees that the City may inspect construction of the Project at any time and at such frequency as the City desires, in the City's sole discretion. The City may require Utility Developer to pay for testing the City deems necessary to determine that the Project complies with City standards and specifications. Utility Developer shall be responsible for obtaining all state, local, and any other required permits and approvals required in order to construct the Utility Improvements.

**5. BIDDING.** This Contract is authorized in part by City Charter Section 84.2, Contracts for Additional Facility Capacity, which special legislation/charter provision exempts Developer and the City from compliance with Article 8, Chapter 143 of the North Carolina General Statutes regarding bidding and other contracting requirements described therein. Utility Developer shall determine whether to bid any contracts for engineering, design, construction, and construction management and shall make all determinations regarding the manner of contracting.

**6. REQUIRED PROTECTIONS FOR CITY IN DEVELOPER'S CONTRACTS.** Utility Developer will ensure that all contracts for engineering, design, construction, and construction management for the Project include specific language that provides that 1) the contract does not limit any warranties provided under operation of statute or common law concerning the engineering, design, construction, adequacy, or performance of the Improvements; 2) the contract does not limit or shorten any statute of limitations provided by law regarding claims concerning the engineering, design, construction, adequacy, or performance of the Improvements; and 3) the City of Durham is named a third party beneficiary of the contract for the purpose of making any claims regarding the engineering, design, construction, adequacy, or performance of the Improvements after their completion and acceptance by the City and 4) all warranties available to the Utility Developer under the contract are, in addition, available and assignable to the City.

**7. PROPERTY ACQUISITION.** Utility Developer shall acquire in fee or through permanent easements sufficient property to meet City standards for the Improvements and for future City maintenance of the Improvements. Property containing the Improvements, whether in fee or in easement, shall be deeded to the City upon completion of the Project as provided hereafter in this Contract. Developer may request that the City consider condemnation of any easement or property necessary for the Project that the Developer cannot reasonably acquire. The determination regarding condemnation shall be made by the City Council in the Council's reasonable discretion. Through approval of this Contract, the City Council hereby determines that construction of the Utility Improvements confers a public benefit and is for a public purpose, given the public benefits to be realized from extension of the City's utility system. In the event of condemnation, Developer shall provide counsel acceptable to the City Attorney's office to represent the City and shall pay all costs associated with the condemnation, negotiation, and litigation, including but not limited to the deposit, attorney fees, witness fees, any additional just compensation awarded, and all other litigation expenses.

**8. CONSULTATION WITH CITY/PROVISION OF INFORMATION.** Utility Developer will designate a Project contact located in the Triangle area for the purpose of providing information to, and regular communication with, the City. Utility Developer will ensure that all information requested by the City Contact regarding design, bidding, contracting, construction administration and review, and other aspects of the Project, is provided in a timely manner. Except where unforeseen or emergency circumstances prevent such notice, Utility Developer shall give the City Contact at least three (3) working days' written notice of significant meetings regarding design review and construction, and other meetings concerning which the City Contact may request notice. If at any time during design, construction, or inspection of the Project, or after completion of the Project, the City Contact requests any information related to the Project, including but not limited to contracts, design drawings, and maps, Utility Developer will ensure that such information is provided in a timely manner.

**9. CITY ACCEPTANCE OF IMPROVEMENTS; WARRANTY.**

**a. Acceptance.** When the Project is completed, Utility Developer shall notify the City Contact in writing, to start the process for City acceptance of the Improvements. City acceptance shall not occur until Utility Developer furnishes the following in the form requested by the City:

- Certified as-built plans for the Improvements;
- Certified construction costs by a professional engineer
- A release of liens from all contractors and subcontractors that have worked on the Project and who have a right under statute to file liens against the Utility Improvements or property on which the Improvements are located;
- Warranty deeds to the City for the Improvements and for the property, whether fee or easements, containing the Improvements, and any supporting legal documentation requested by the City. (The City may excuse this requirement for property for which legally sufficient dedications have been made by plat);
- Releases of any mortgage or security interests held in the Improvements or in the property containing the Improvements;
- Other information the City deems is necessary for the City to accept the Improvements and property containing the Improvements.

Upon the City's determination that construction has been completed in compliance with City standards, and that the other requirements of this paragraph have been met, the City shall accept the Utility Improvements and associated property or property interests, shall have the rights described hereafter, and shall thereafter maintain the Improvements. The decision to accept the Utility Improvements shall be made by City Council. The City shall document the date it accepts the Utility Improvements through a written letter signed by the City Authorized Designee.

**b. Warranty.** Acceptance of the Utility Improvements shall not be deemed to be a determination by the City regarding the quality, fitness, or adequacy of the Utility Improvements. Developer shall warrant the Improvements for two years from the date of City acceptance for pump stations, booster stations, water storage facilities, and force mains, and for one year for gravity flow lines. If within the Warranty Period, the City determines, in its reasonable

judgment, that there are problems or defects in any portion (including but not limited to design, workmanship or materials) of the Utility Improvements, the City shall provide written notice to the Utility Developer and within 30 days (or a mutually agreed upon time) after receipt of such notice, Utility Developer shall commence to correct the problems or defects, at Utility Developer's expense, and shall diligently pursue completion of such problems or defects. If the Improvements have been constructed to the capacity previously agreed upon by the parties the City may not claim that the capacity of the Utility Improvements is inadequate as designed. The rights enjoyed by the City under this Contract shall in no way limit the City's rights as a third party beneficiary to bring claims against contractors regarding the Project.

**c. City Ownership and Control of Improvements.** Upon the City's acceptance of the Improvements, the City shall use the Improvements to provide utility service. The City shall have sole ownership, control over, and use of the Improvements and associated property interests. Among other things, the City may make extensions from, connections to, and alterations to any of the Utility Improvements, and/or make any other decisions regarding the Improvements without consent of Utility Developer, provided such extensions, connections, alterations, and/or decisions do not interrupt, hinder or delay water and/or sewer service to the Utility Developer's development.

#### **10. ELIGIBLE COSTS; DOCUMENTATION; REIMBURSABLE COSTS.**

**a. Eligible Costs.** The following costs are eligible to be considered as Reimbursable Costs of the Project if they fall within the percentage limitations set forth below, and if they are documented as provided in (b) below.

- *Construction Costs.* Engineer-certified costs of labor and materials for constructing the Project.
- *Engineering and Design Costs.* Engineer certified cost of engineering and design work, including permitting, for the Project.
- *Project Administration.* Costs of administering the Project, including administration of construction contracts and oversight of work performed under such contracts.

**The Eligible Costs for second and third areas above -- engineering, design, and project administration -- combined, shall be 25% of the certified construction costs of the Project.**

- *Legal Fees.* Costs of legal work on contracts, claims, litigation, property and title research and examination, for the Project, where such work occurs **after** execution of this Contract.
- *Property Acquisition.* Costs of acquiring any property or easements in which the Utility Improvements are located.

**The Eligible Costs for legal fees and property acquisition, combined, shall be the actual costs, not to exceed 5% of the certified construction costs of the Project.**

**b. Documentation of Eligible Costs.** Prior to acceptance of the Improvements and prior to the City's determination of the Reimbursable Costs for the Project, the Utility Developer shall submit the information described below. The information shall be submitted in such form and detail as may be requested by the City, along with any such additional information (such as contracts or invoices) that the City may request:

- the certified statement of an engineer licensed in North Carolina, regarding the Construction Costs of the Project, with a break down of unit and quantity costs, and such other expenses and descriptions of the Project as the City may request.
- a verified statement from a responsible officer of Utility Developer identifying the individual(s) or firm(s) that performed the engineering, design, and administrative work for the Project, the portions of the Project for which they were responsible, and the amounts paid to such individual(s) and/or firm(s).
- for legal work, one or more signed statements from a responsible attorney with the firm(s) doing such work summarizing the costs paid by Utility Developer for legal work on the Project after execution of this Contract;
- for property acquisition, 1) a verified statement from a responsible officer of Utility Developer of amounts paid in connection with property interests acquired after execution of this Contract; 2) the deeds for such property interests.

**c. Retention of Documents Regarding Costs.** Utility Developer shall maintain all contracts associated with the design, engineering, construction, and administration of the Project, and legal work and property acquisition for the Project, and the payment records and invoices for the Project, for five (5) years following completion of the Project, and shall produce such records and any other information related to the work upon City request.

**d. City Determination of Reimbursable Costs.** Upon receipt of proof of the Eligible Costs and any other information the City may request, the City shall determine the Reimbursable Costs for the Project, in a letter to be signed by the Authorized City Designee. Except in the event that the City determines that the certified Construction Costs are unreasonable, as further described in this Paragraph, the Reimbursable Costs shall be the certified Construction Costs; plus 25% of the certified Construction Costs; plus the actual costs for legal work and property acquisition for the Project, however they shall be limited to no more than 5% of the certified Construction Costs. In the event that the City determines that the certified Construction Costs are substantially higher than customary amounts charged for construction work of a similar nature in the Research Triangle area, the City may limit the certified Construction Costs to no less than 90% of the certified Construction Costs that have been submitted. The City's determination of such reimbursable Construction Costs will be the basis for reimbursement of the other expenses, set at a percentage of the certified Construction Costs. If the City questions the reasonableness of the certified Construction Costs, the City Contact shall first notify the Utility Developer and shall consider all information provided by the Utility Developer. The City's determination of Reimbursable Costs shall be final.

## **11. EARLY REIMBURSEMENT FOR OVER-SIZED UTILITY LINES**

Within 30 business days after acceptance by the City of certain over-sized utilities that have been installed by the Utility Developer in a phase and acceptance of final engineering certified



construction costs, the City will reimburse the difference in Eligible Costs between the oversized facility actually installed and the minimum facility that would have been required to service the Developer's Project. Utilities that are eligible for early reimbursement under this section include the sewer force main and the final cell of the pump station wet well. These reimbursement costs shall be limited to a maximum of \$635,000 for the sewer force main and \$40,000 for the final cell of the pump station wet well.

Reimbursement will be made to the Utility Developer within 30 days of Acceptance of the sewer force main and the Pump station wet well's final cell, or completed portion or phase thereof, in accordance with paragraph 9a.

## **12. PAYMENTS FROM FUTURE EXTENSION AGREEMENTS.**

**a. Reimbursement under this section applies to the Pump Station, wet well, odor control facility, generator, other Pump Station appurtenances, and force main costs (not associated with direct reimbursements), and gravity sanitary sewer mains. Other Eligible Costs of the Pump Station including property easements will be reimbursed under this section as defined in section 10 above.**

**b. Reimbursement Period; Start Date; Extension if Moratorium.** The Reimbursement Period shall begin on the date documented by the City in writing, after the City determines the Reimbursable Costs and accepts the Utility Improvements. The Reimbursement Period shall be the time period set forth in the definitions above, but shall end sooner if the Adjusted Reimbursable Costs are fully paid prior to the end of such period. In the event the City or County enacts a moratorium that prevents residential zonings, issuance of building permits, execution of Extension Agreements, or sewer connections within the Service Area such moratorium period(s) shall be added to the Reimbursement Period, extending the Reimbursement Period by the time(s) of the declared moratorium.

**c. Pass Through of Payments from Utility Extension Agreements.** The City shall pass through payments received by Future Benefited Developments, less an administrative retainage and City oversized reimbursement infrastructure retainage, to reimburse the Utility Developer for its Reimbursable Costs, adjusted as described below ("Adjusted Reimbursable Costs"), during the Reimbursement Period in accordance with the further terms of this Contract. This Contract creates no obligation to reimburse Utility Developer if such payments are insufficient for any reason, including but not limited to lack of development, legal or governmental action, or acts of God. To the extent permitted by applicable law, without making any covenant or representation regarding such applicable law, the City agrees that it will require Future Benefited Developments to pay the Reasonable Infrastructure Payment pursuant to the City's Utility Extension Agreements until the Adjusted Reimbursable Costs have been paid or the Reimbursement Period has expired, whichever occurs sooner, and that it will require such payment to be made prior to receipt of necessary Water and Sewer permits from the City for utility lines being constructed to serve the Future Benefited Developments.

The Reasonable Infrastructure Payment is distinct from other charges that may be imposed by the City as a condition of development, such as fees for the processing of utility extension agreements, permitting of lines, or frontage charges, or fees typically paid later in the development process by individual lot owners or utility users such as connection fees, capital facility fees, or impact fees. This Contract creates no obligation for the City to remit any portion of any of these distinct charges to Utility Developer.

Notwithstanding anything contained herein, Utility Developer will not be required to make Reasonable Infrastructure Payments associated with the Project and all Reasonable Infrastructure Payments shall be paid to Utility Developer without offset or deduction of the amounts (Reimbursible Costs) Utility Developer has incurred to construct the facilities to serve Basin 25 except as allowed by this agreement.

**d. Priority to Utility Developer.** To the extent permitted by law, the City commits to pass through the Reasonable Infrastructure Payments received from Future Benefited Developers for payment of this Contract prior to payment of any other similar contracts in the Service Area until the obligations of this Contract have ended. This provision shall not limit the City's ability to require that Future Benefited Developers make payments additional to the Reasonable Infrastructure Payment in order to pay for other facilities in the Service Area.

**e. Reasonable Infrastructure Payments; Amount.** The Parties agree that the following payments by Future Benefited Developments are reasonable, in light of the anticipated cost of the Utility Improvements, and rational assumptions regarding new development, potential use of the Utility Improvements, and the Reimbursement Period: for detached single-family dwellings, \$2,500.00 USD per unit, and for all uses other than detached single family dwellings, such as multifamily and nonresidential development, \$11.57 USD per gallon per day of permitted wastewater flow (as defined by the sewer design flow rates found in the North Carolina Administrative Code Section 15A NCAC 02H .0200 – Waste Not Discharged to Surface Waters.) In the reasonable discretion of the City, this Reasonable Infrastructure Payment may be adjusted upward by a maximum of ten (10) per cent at intervals of 5 years from the start date of the Reimbursement Period.

**f. Example of Application of Reasonable Infrastructure Payment.** The following example illustrates the payment that is anticipated that Future Benefited Developments will make to the City for the Utility Improvements, pursuant to Utility Extension Agreements. A developer of a Future Benefited Development who intends to build one hundred 3-bedroom single family units will enter into a Utility Extension Agreement with the City. The Future Benefited Development will pay 100 times \$2,500, or \$250,000, to the City prior to receipt of approval for permits for utility lines to serve the Future Benefited Development.

**g. Administrative Costs/Retainage.** The City shall retain: for detached single-family dwellings, \$109.07 USD of the \$2,500.00 USD per unit, and for all uses other than detached single family dwellings, such as multifamily and nonresidential development, \$0.50 USD of \$11.57 USD per gallon per day of permitted wastewater flow (as defined by the sewer design flow rates found in the North Carolina Administrative Code Section 15A NCAC 02H .0200 – Waste Not Discharged to Surface Waters) of payments from Future Benefited Developments for

the City's costs of administering the payment provisions described herein. This amount represents five (5) percent of the remainder of the payments from Future Benefited Developments less the City Oversized Reimbursement Infrastructure Retainage below. Any adjustments to the Reasonable Infrastructure Payment shall likewise adjust the Administrative Costs/Retainage amount by the same value (example: increase of 10% of the reasonable infrastructure payment shall result in a 10% increase of the administrative costs/retainage amount).

h. **City Oversized Reimbursement Infrastructure Retainage.** The City shall retain: for detached single-family dwellings, \$318.57 USD of the \$2,500.00 USD per unit, and for all uses other than detached single family dwellings, such as multifamily and nonresidential development, \$1.47 USD of \$11.57 USD per gallon per day of permitted wastewater flow (as defined by the sewer design flow rates found in the North Carolina Administrative Code Section 15A NCAC 02H .0200 – Waste Not Discharged to Surface Waters) of payments from Future Benefited Developments for the City costs of direct oversized line reimbursements of the infrastructure being installed. This amount represents twelve point seven four (12.74) per cent of payments from Future Benefited Developments. Any adjustments to the Reasonable Infrastructure Payment shall likewise adjust the City Oversized Reimbursement Infrastructure Retainage amount by the same value (example: increase of 10% of the reasonable infrastructure payment shall result in a 10% increase of the city oversized reimbursement infrastructure retainage amount).

### **13. ADJUSTMENTS TO AND TRACKING OF REIMBURSABLE COSTS AND PAYMENTS.**

The Reimbursable Costs as calculated pursuant to Paragraph 10 above shall be adjusted during the Reimbursement Period ("Adjusted Reimbursable Costs") as described in (a) and (b) below.

a. **Interest on Reimbursable Costs.** The unpaid balance of the Reimbursable Costs shall be increased on a yearly basis on the anniversary date of the start of the Reimbursement Period by applying interest at a six (6%) per cent simple interest rate to the remaining unpaid balance.

b. **Deductions to Reimbursable Costs for City Repairs or other Costs.** Certain costs sustained by the City shall be deducted from the Reimbursable Costs. Such costs are: the costs to diagnose or repair, and/or to make and prosecute any claims regarding, problems or defects (including but not limited to design, workmanship, performance, and materials) in any portion of the Utility Improvements where the problem is identified and communicated to Utility Developer within the applicable Warranty Period and the Utility Developer fails to commence repairs within 30 days of written notice; the costs to defend any actions brought by lienholders such as contractors' liens pertaining to the Improvements or to the property in which they are located; and the costs to establish or defend good title to the Improvements or to the property in which the Improvements are located. These costs may also include reasonable administrative costs sustained by the City. Diagnosis and repair costs shall not include any repairs necessitated by inadequate maintenance by the City of the Utility Improvements. The amounts deducted for the

costs described in this paragraph shall be retained by the City from the Reasonable Infrastructure Payments, and shall also be deducted from the Reimbursable Costs owed to Utility Developer.

**c. Reimbursement Schedule/Monitoring.** The City shall pass through Reasonable Infrastructure Payments from Future Benefited Developments on a quarterly basis, commencing on the first day of the quarter following receipt of the Reimbursable Infrastructure Payment. The City shall document on an ongoing basis the Reimbursable Costs, Reasonable Infrastructure Payments received, retainage, City payments made, yearly interest, deductions from Reimbursable Costs for City repairs or other costs pursuant to (b) above, and the remaining Adjusted Reimbursable Costs still to be paid and shall include such information with each quarterly payment to Utility Developer. Because payments from Future Benefited Developers will vary, the City's payments to Utility Developer are expected to vary from quarter to quarter and year to year.

**d. Disputes Regarding Adjusted Remaining Reimbursable Costs.** The Utility Developer shall notify the City within 180 days of receipt of payments under (c) above regarding any disagreement with the City's determination of the remaining Adjusted Reimbursable Costs still to be paid. Developer's failure to do so shall waive any claim regarding the Adjusted Reimbursable Costs still to be paid under this Contract.

**14. ADDITIONAL PROJECT WORK.** The City and the Utility Developer may agree to expand the scope of the Project by adding minor outfalls or other minor work to the Project. Documentation of such expansions of the Project shall be in the form of a written description of the expanded Project which shall be signed by both parties. The City Manager or his authorized designee shall sign on behalf of the City. The costs of the additional construction shall be treated as part of the original Utility Improvements, eligible for reimbursement in the same manner and in the same time frame as set forth for the originally contemplated Utility Improvements described herein.

**15. WASTEWATER TREATMENT CAPACITY.** This Contract does not obligate the City to reserve any wastewater treatment capacity at any present or future wastewater treatment plant, or to construct or otherwise provide any new or additional wastewater treatment plant or capacity.

#### **16. INDEMNIFICATION.**

**(a) Indemnification.** To the maximum extent allowed by law, Utility Developer shall defend, indemnify, and save harmless the City from and against all Charges that arise in any manner from, in connection with, or out of this Contract as a result of acts or omissions of the Utility Developer or contractors or subcontractors or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, unless caused by any act or omission of the City, its agents, employees, or contractors. In performing its duties under this subsection "a," Utility Developer shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City.

**(b) Definitions in this Section.** As used in subsections "a" above and "c" below,

“charges” means claims, judgments, costs, damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements, and expenses (included without limitation within “Charges” are 1) interest and reasonable attorneys' fees assessed as part of any such item, and 2) amounts for alleged violations of sedimentation pollution, erosion control, pollution, or other environmental laws, regulations, ordinances, rules, or orders -- including but not limited to

any such alleged violation that arises out of the handling, transportation, deposit, or delivery of the items that are the subject of this Contract). In this Indemnification, “the City” includes the City and its officers, officials, employees, independent contractors, and agents. The Utility Developer shall not be considered an “agent” under this Contract.

**(c) Other Provisions Separate.** Nothing in this section shall affect any warranties in favor of the City that are otherwise provided in or arise out of this Contract. This section is in addition to and shall be construed separately from any other indemnification provisions that may be in this Contract.

**(d) Survival.** This section shall remain in force despite termination of this Contract (whether by expiration of the term or otherwise) and is not limited by any Warranty Period appearing elsewhere in the Contract.

**(e) Limitations of the Developer’s Obligation.** If this section is in, or is in connection with, a contract relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, then subsection “a” above shall not require Utility Developer to indemnify or hold harmless Indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the City.

**17. WRITTEN CONSENTS FROM THE CITY.** Where this Contract refers to written approvals or consents to be given by the City and the person or position that may give consent is not identified, the authority to give such approvals shall be delegated to the Authorized City Designee, as defined herein. An approval required by this Contract shall not be effective unless given in writing. Consents or approvals specifically delegated to the City Manager or the City Council in this Contract are excluded from the operation of this Section. Any dispute between the Utility Developer and a delegated party acting on behalf of the City may be submitted to the City Manager for review and resolution. Notwithstanding the foregoing, nothing herein shall prevent either party from pursuing other remedies available to it including requesting relief from courts of appropriate jurisdiction.

**18. NO WAIVER OF GOVERNMENTAL AUTHORITY OR DISCRETION.** Nothing in this Contract shall be construed to bind, estop, direct, limit, or impair the future regulatory, legislative, or governmental discretion of the Durham City Council in a manner not permitted by law. The City shall incur no liability to the Utility Developer for any losses or damages it may incur as a result of or in connection with the City’s exercise or performance of its regulatory, legislative, or governmental powers or functions, or any judicial determination

regarding the same.

## **19. MISCELLANEOUS.**

**(a) Choice of Law and Forum.** This Contract shall be deemed made in Durham County, North Carolina. This Contract shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this Contract shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court. This section shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

**(b) Waiver.** No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

**(c) Performance of Government Functions.** Nothing contained in this Contract shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

**(d) Severability.** If any provision of this Contract shall be unenforceable, the remainder of this Contract shall be enforceable to the extent permitted by law.

**(e) Assignment. Successors and Assigns.** The Utility Developer may assign and/or pledge its rights and obligations that arise out of this Contract for the purpose of securing debt and financing the Utility Improvements without the approval or consent of the City; however, Utility Developer shall notify the City in writing of such assignment or pledge. Without the City's written consent, which shall not be unreasonably withheld or delayed, Utility Developer shall not otherwise assign (which includes to delegate) any of its rights (including the right to payment) or duties that arise out of this Contract however, Utility Developer may assign its rights and/or duties under this Contract to an affiliate of Utility Developer and/or PulteGroup Inc., without the prior consent of the City. Notice of any assignment by Utility Developer of its rights and obligations arising under this Contract shall be provided within 14 days of such assignment. Notwithstanding any right to assign or agreement to allow assignment, the City is not obligated to pay more than one entity under this Contract. The City Manager may consent to an assignment without action by the City Council. Without granting Utility Developer the right to assign, it is agreed that the duties of the Utility Developer that arise out of this Contract shall be binding upon it and its heirs, personal representatives, successors, and assigns.

**(f) Compliance with Law.** In performing all of the Project, the Utility Developer shall comply with all applicable laws, ordinances, regulations, and policies.

**(g) City Policy.** THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

**(h) Equal Employment Opportunity (EEO) Provisions.** During the performance of this Contract Utility Developer agrees as follows: (1) Utility Developer shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. (2) Utility Developer shall in all solicitations or advertisement for employees or contractors placed by or on behalf of Utility Developer regarding this Project, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. (3) Utility Developer shall require these EEO provisions to be included in every contract it enters into related to this Project, and shall require that its contractors and their subcontractors conform with these EEO provisions.

**(i) No Third Party Rights Created.** This Contract is intended for the benefit of the City and Utility Developer and not for any other person, and no such persons shall enjoy any right, benefit, or entitlement under this Contract.

**(j) Principles of Interpretation and Definitions.** In this Contract, unless the context requires otherwise: (1) the singular includes the plural and the plural the singular. The pronouns “it” and “its” include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words “include,” “including,” etc. mean include, including, etc. without limitation. (2) References to a “Section” or “section” shall mean a section of this Contract. (3) “Contract” and “Agreement,” whether or not capitalized, refer to this instrument. (4) Titles of sections, paragraphs, and articles are for convenience only, and shall not be construed to affect the meaning of this Contract. (5) “Duties” includes obligations. (6) The word “person” includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities. (7) The word “shall” is mandatory. (8) The word “day” means calendar day.

**(k) Modifications; Entire Agreement.** A modification or amendment of this Contract is not valid unless signed by both parties and otherwise in accordance with requirements of law. Modifications to this Contract may be made by the City Manager if they are within the dollar thresholds that have been approved by the City Council as within the City Manager’s authority, or, in the event that the modifications are not associated with a dollar amount, if they do not substantially increase the obligations of the City or substantially reduce the obligations of the Utility Developer. Other modifications may only be made if approved by the City Council on behalf of the City. Notwithstanding these requirements, changes to the constructed Utility Improvements and to the Reasonable Infrastructure Payments can be made by the designated City employees described in the earlier sections of this Contract. This Contract contains the entire agreement between the parties pertaining to the subject matter of this Contract. With respect to that subject matter, there are no promises, agreements, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this Contract.

**(l) Force Majeure.** The parties hereto shall not be liable for any failure to perform hereunder as a result of an external event or events beyond their respective control, including, without limitation, acts of the United States of America, acts of the State of North Carolina

(including the denial of permits which the Developer has pursued in good faith), embargos, fire, flood, drought, hurricanes, tornadoes, explosions, acts of God or a public enemy, strikes, labor disputes, civil suits, injunctions, vandalism or civil riots. However, if any such event interferes with the performance by a party hereunder, such party shall diligently and in good faith act to the extent within its power to remedy the circumstances affecting its performance or to complete performance in as timely a manner as is reasonably possible. Additionally, if in the opinion of the Parties, the delays in permitting or constructing the Regional Pump Station are not reasonable, the Parties may agree that the Utility Developer discontinue further work on the Regional Pump Station without penalty to the referenced projects above. In such event, the Utility Developer shall convey to the City all plans, designs and work product relating to the Regional Pump Station without reimbursement, as well as any and all easements and the site, if obtained or controlled.

**(m) Remedies.** All remedies as are otherwise allowed or provided by law are available to the Parties to this Contract, unless specifically limited as described in specific provisions of this Contract.

**(n) Covenant of Good Faith and Fair Dealing.** The Parties hereby covenant one to the other to cooperate and act in good faith to perform their respective obligations under this Contract and shall refrain from any action inconsistent with their contractual rights or obligations as defined by applicable law .

**(o) No Joint Venture/No Agency.** Nothing in this Contract shall be construed to create a joint venture between the parties, or to make the Utility Developer an agent of the City. Nothing in this Contract shall be construed to make the City an owner or contractor or responsible party with regard to any contracts entered into by Utility Developer

**IN WITNESS WHEREOF**, the City and the Utility Developer have caused this Contract to be executed under seal themselves or by their respective duly authorized agents or officers.

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act

PULTE HOME CORPORATION, a Michigan Corporation

By: \_\_\_\_\_  
(Print Name) \_\_\_\_\_  
Its: \_\_\_\_\_



NORTH CAROLINA  
WAKE COUNTY

I, \_\_\_\_\_, a Notary Public of the County and State aforesaid, certify that \_\_\_\_\_, either being personally known to me or proven by satisfactory evidence (said evidence being \_\_\_\_\_), personally appeared before me this day and stated that (1) (s)he is a officer of PULTE HOME CORPORATION, a Michigan Corporation organized and existing under the laws of the State of Michigan, and (2) (s)he is authorized to enter into the above contract on behalf of the Company, and (3) that the foregoing contract with the City of Durham carries on the company's business in the usual way, and (4) that he voluntarily executed the foregoing Contract on behalf of the Company for the purposes stated therein.

WITNESS my hand and official seal or stamp, this the \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Print Name

My Commission Expires:

\_\_\_\_\_

[SEAL OR STAMP]

ATTEST:

**CITY OF DURHAM**

By: \_\_\_\_\_  
\_\_\_\_\_ City Clerk

\_\_\_\_\_  
City Manager

[Affix Municipal Seal]

**STATE OF NORTH CAROLINA**

**COUNTY OF DURHAM**

I, \_\_\_\_\_, a notary public in and for the County of Durham, North Carolina certify that \_\_\_\_\_ personally appeared before me this day and acknowledged that he/she is \_\_\_\_\_ City Clerk of the **CITY OF DURHAM**, a municipal corporation, and that by authority duly given and as the act of the City, the foregoing contract was signed in its name by its \_\_\_\_\_ City Manager, sealed with its corporate seal, and attested by himself/herself as its said City Clerk or Deputy City Clerk.

Witness my hand and notarial seal, the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

My commission expires:

\_\_\_\_\_

\_\_\_\_\_  
Notary Public